No. 11916

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

J. W. ROGERS,
Appellant,

vs.

PACIFIC ATLANTIC STEAMSHIP COMPANY, a corporation
Appelle.

BRIEF OF APPELLEE PACIFIC ATLANTIC STEAMSHIP COMPANY

Upon Appeal from the District Court of the United States for the District of Oregon.

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SUBJECT INDEX

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STATEMENT OF CASE

This is an action wherein the libelant seeks recovery for the results of an alleged wrongful discharge. Libelant claims the wages he would have earned on the balance of the voyage and damages for "inconvenience, humiliation and anxiety."

The SS JEFFERSON MEYERS, upon which libelant was serving as First Assistant Engineer, commenced the voyage in question on January 7, 1946, bound for the Orient. The ship went to Shanghai, to the Phillippine Islands, and then back to Shanghai where, on June 19, 1946, the events took place which resulted in this law suit. In the afternoon of that day the master and libelant exchanged heated words as a result of which libelant went ashore, never to report for duty aboard this vessel again.

Libelant claims that he was discharged by the master on that day and that, because of the threats which the Master made against him, he was afraid of violence if he returned to the ship. Libelant was ordered to return to the ship by the United States Coast Guard office in Shanghai, but he refused to do so. He stowed away on the SS GENERAL MIX which left Shanghai while the JEFFERSON MEYERS was still in that port.

When the JEFFERSON MEYERS sailed from Shanghai on July 11, 1946, libelant was not aboard and was logged as a deserter. Upon the arrival of the ship at Seattle, Washington, the first continental United States port, the master turned libelant's wages earned through July 11, 1946, and his clothing over to the United States Shipping Commissioner for deposit with the District Court sitting in that city.

This proceeding has nothing to do with the wages earned on this voyage through July 11th. So far as the

record in this case shows and so far as counsel for appellee are informed, these wages are still on deposit with the Court.

Thus, the main issue presented to the trial court was whether libelant was wrongfully discharged or whether libelant was a deserter. The trial court found that there was no wrongful discharge and dismissed the case. In its opinion, the trial court stated (Ap 10):

> "No doubt, in the light of all the unpleasantness that arose, Rogers felt justified in pursuing the course he took. Still, his conduct cannot now be condoned to the extent of allowing compensation for a job he failed and refused to carry through."

THE FACTS

During this entire voyage the JEFFERSON MEYERS was under the direction of the United States Government, military and civil. It took a cargo of wheat to China. Then it went to the Philippine Islands where a cargo, generally described as filthy and rotten, a cargo of surplus supplies being shipped for UNNRA in China, was loaded. In addition some dynamite was also put aboard. The ship returned to Shanghai.

Upon arrival at Shanghai it was found that the port was crowded. Under conditions of extreme heat, with filthy cargo and dynamite in her holds, the JEFFERSON MEYERS was required to stand off the Port of Shanghai for 14 days. (T. 113). No shore leave was granted during this period (T. 114). The food had been short and sometimes poor. On June 19, 1946, the nerves

and patience of all on the ship were taut to the point of breaking.

During the dinner hour on that day, some of the officers were entertaining a visitor, one Welch, at dinner aboard the ship. Captain Hughes came down for his evening meal and discovered the visitor eating at the deck officer's table, leaving no room for the master to eat. It was also against the rules for guests to be eating aboard without the prior approval of the master or the War Shipping Administration, charterer of the vessel. (T. 132). Whereupon, Captain Hughes ordered Welch off the ship.

Instead of leaving, Mr. Rogers, libelant, took Welch to his room. Captain Hughes, seeing this, went to Rogers' room and repeated his order that Welch leave the ship. (T. 119).

Soon thereafter Rogers and Welch went to the dock, and in plain view of the bridge of the JEFFERSON MEYERS, Rogers began writing a letter to the appellee, its agent in Shanghai, the American Consul, the Coast Guard and the War Shipping Administration, complaining of the master's conduct. (T. 16, 17). Rogers gave the Master a copy of the letter and told him what he was going to do with it. (T. 21).

The foregoing events and conversations were the only occurrences between Rogers and the Master. There is absolutely no testimony that the Master told Rogers he was discharged or made any threats to Rogers.

Libelant relies upon considerable hearsay testimony consisting of statements which the Master allegedly made to the Chief Mate and the Chief Engineer that Rogers was discharged and that Rogers would suffer severe injury if the Master saw him aboard the ship the next day.

In response to the charges filed by Rogers, the American Consul, acting through the United States Coast Guard, conducted a hearing aboard the ship. The investigating officer listened to the testimony of all parties involved as well as other officers and men aboard the ship. He concluded that the charges were not well founded and entered in the ship's official log book (Ex. 4):

> "10 July 1946. Shanghai, China.
> Trouble aboard vessel settled by agreement. Master admonished. Charges against Master, Chief Mate and 1st Assistant Engineer withdrawn.
>
> J. O. Thompson, Lt. Comdr.,
> U. S. C. G. R."

Attached to the official log is the report of the investigation by the Coast Guard to the American Consul in Shanghai, dated June 26, 1946, in which the officer reported:

> "As a result of this investigation the master A. P. Hughes was admonished; chief mate, Robert W. Reusswig and acting first assistant J. W. Rogers, were ordered to return to the vessel and resume their regular duties.
>
> "Reusswig and Rogers were warned that failure to comply with this order would result in a charge of desertion against them with a possible revocation of their license and the penalty of forfeiture as provided by law."

Both men refused to return to the ship unless the Coast Guard would give them orders in writing directing them to do so (T. 24). Such orders were given to Chief Mate Reusswig, he returned to duty, and continued the remainder of the voyage. He was not logged for the days he was ashore pending the settlement of these differences. He was paid for the three weeks when he was ashore and when he was not working aboard the ship.

Libelant Rogers avoided the service of the written order on him (T. 129), and in fact, stowed away on a vessel returning to the United States *six days before the JEFFERSON MEYERS sailed from Shanghai.* (T. 28, 46). The plain fact is that he never intended to return to the JEFFERSON MEYERS irregardless of the action taken by the Coast Guard and the American Consul.

It is to be noted that Chief Mate Reusswig was the person who claimed to have been actually threatened by the Master. He was the one who had all the direct contact with the Master. Yet he followed the lawful directions of the proper authorities. He returned to the ship and completed the voyage. He received all his pay for the remainder of the voyage and he suffered no "inconvenience, humiliation and anxiety."

The trial court heard all the testimony and observed the witnesses. There was no testimony by deposition. He concluded that Rogers *did not* flee because he feared the Master. "Their differences reached no higher level than a school-yard quarrel."

APPELLANT'S ASSIGNMENTS OF ERROR

In his brief appellant does not mention his assignments of error. These errors, while assigned, are not argued and they should, therefore, be deemed waived. *Stetson* v. *United States,* 155 F. 2d. 359 and cases cited therein.

Appellant does spend considerable time and space in his brief arguing the facts. In reality his Assignments of Error are only allegations that the trial court found the facts against appellant. Most of the evidence is conflicting, as the Court will determine upon examination of the record herein.

The evidence does not show, as appellant claims, that Rogers was discharged. It does show that Rogers deserted the ship.

Desertion consists in the abandonment of duty by quitting the ship before the termination of the engagement, without justification, and with the intention of not returning. *City of Norwich,* 279 Fed. 687; *M. S. Elliott,* 277 Fed. 800; *Flynn* v. *Waterman Steamship Company,* 44 F. Supp. 50.

The evidence is abundant that Rogers never intended to return to the ship. He was dissatisfied with the results of the Coast Guard hearing and the action of the American Consul to such extent that he inspired inflammatory propaganda similar to that in Exhibit 2. (T. 43). He was seeking support "for pressing these charges and having

the guts to carry it to the Admiralty Court over the actions of the U. S. Consul and the Coast Guard Hearing Detail."

Rogers refused to accept the oral order of the Coast Guard officer that he return to the ship. (T. 24). He deliberately absented himself so that a written order could not be given him. (T. 129). He even stowed away on another vessel six days before the JEFFERSON MEYERS sailed. (T. 28, 46). Such a course of conduct makes it clear that Rogers never intended to return to this ship.

In view of all the circumstances at the time, Rogers had no justification for leaving the ship. There was no direct threat ever made to Rogers. It was all hearsay to him. The Chief Engineer told him some, the Chief Mate told him something else. There was no previous trouble between Rogers and the Master; in fact, they were pictured as great friends all through the voyage up until June 19. (T. 36, 111). There was no evidence of any violence on the part of the Master either before, during or after the Shanghai incident. Attempt has been made to taint the Master by showing allegedly arbitrary and unreasonable acts before and after the Shanghai incident, but in not one of these acts is any violence shown.

How then can Rogers justify his leaving the JEFFERSON MEYERS on the grounds of fear? All he had was a hearsay threat from a person he had always been able to get along with and with whom he was very friendly.

The testimony concerning the Master's conduct on June 19th is conflicting. Rogers' story is colored by his wounded pride. Such does not constitute a justification for desertion. *The Alvena,* 22 Fed. 861.

The claims of drunkenness, threats of great bodily harm, discharges, etc., were all denied by the Master. The testimony shows that the Master was armed, but he was so armed because of the belligerent attitude of some of the crew, including Rogers (T. 124). The Master made no threat to Rogers.

The occurrences respecting Welch in the dining saloon are greatly magnified and distorted in Rogers' testimony and contradicted by the Master.

One of the chief complaints made by Rogers was that the Master was required to report to the Chinese Customs all unmanifested articles. (T. 127). Upon inspection by the Chinese Customs many contraband articles were found, including a jeep Rogers had obtained (T. 45). Resentment against the Master because of this was probably one of Rogers' most impelling motives in pursuing his course of conduct.

In his opinion the trial court stated that the evidence did "not compel conviction that plaintiff fled because he feared the Master. Their differences reached no higher level than a school-yard quarrel." (Ap. 10). The trial court also made the following finding of fact (Ap. 12):

> III
>
> "Plaintiff deserted said ship because of petty differences with the Master and such desertion was not caused by fear or threats from the Master as claimed by plaintiff."

APPELLANT'S PROPOSITION I

Appellant contends as a matter of law that a seaman is justified in leaving a vessel through fear induced by cruel treatment and threats of physical violence. After stating this principle of law, appellant argues the evidence from pages 9 through 29 of his brief.

First as to the proposition of law. The majority of the decided cases upon this proposition are cases where the seaman is seeking recovery of wages he earned before he left the ship. If the seaman deserted, he would not be entitled to those earned wages. 46 U. S. C. A. §701.

Generally the courts hold that unreasonable and continued acts of cruelty by the officers of a ship will justify a seaman leaving the ship. But such cruelty and oppression must be grossly excessive.

Steele v. *Thacher,* Fed. Cas. No. 13,348:

> "There may be cases of such extreme and persevering cruelty on the part of the master as will justify him in deserting. But it must be a strong case. I am, as at present advised, far from being prepared to hold that a battery, simply because it is excessive, will be a justification, even though it should pass very considerably beyond the limits of a moderate discretion. As a general rule, it seems to me that another ingredient should enter into the case. The seaman who proposes, on this ground to justify a desertion, should not only exhibit proof of the injury, but a just and reasonable ground of apprehension that it would be causelessly repeated, either by showing a general disposition to cruelty on the part of the master, or the existence of some particular pique or mal-

> evolence toward him personally. The policy of the law discourages the separation of the mariner from the vessel before the termination of the voyage, especially in a foreign port."

The Steele case is one of the early cases on the duty of seamen to remain with the ship and states law which is good today. The statutes look with disfavor on a man leaving a ship before the termination of the voyage. 46 U. S. C. A. §701.

Congress has provided the machinery to settle problems, such as arose here, at the time they arise. Under 46 U. S. C. A. §685, the American Consul must inquire into any complaints made by seamen that the vessel is unseaworthy or against the officers for cruel treatment. If he finds the charges to be true, he orders that the seamen be paid an additional month's wages and provided with employment on another ship or transportation home.

Rogers, being a seaman fully aware of all his rights, immediately brought his charges against the Master before the American Consul. (T. 17). In accordance with the statute, the Consul instituted an inquiry into the matter and decided against the charges. (Ex. 4). Mr. Reusswig, the Chief Mate, recognized the powers and responsibilities of the Consul and, when the order was given to return to the ship, did so. Although he may have resented the decision against him, he knew that by law he was required to return. (T. 77).

Rogers, however, would not accept the decision of the Coast Guard and American Consul. He took the law

into his own hands and refused to obey the orders to return to his ship. He violated the statute against stowing away on vessels, 18 U. S. C. A. §469, by returning home on the GENERAL MIX. Other employment was available to him through the War Shipping Administration in Shanghai, but Rogers was too anxious to institute a law suit to seek his vengeance on the Master to sign off the JEFFERSON MEYERS. (T. 28). He could have been gainfully employed as an engineering officer during the period for which he now seeks recovery, but he failed to do so and thus failed to minimize his loss.

Under these circumstances, it appears that Rogers was properly classed in the log book and on the Shipping Articles as a deserter (Ex. 3).

The City of Norwich, 279 Fed. 687, discussed in appellant's brief, is not in point in this case. The libellants in the *City of Norwich* were claiming wages up to the time they left the ship. They were attempting to avoid the forfeiture of these wages by asserting cruelty on the part of the ship's officers. As pointed out previously in this brief, appellant is not suing here to recover for the wages earned up to the time he left the ship. These are on deposit in the District Court sitting in Seattle.

If Rogers was not a technical deserter from the JEFFERSON MEYERS, he would be entitled to his wages up to the time he left the ship. A seaman who absents himself without leave and does not return to the ship by sailing time, under circumstances not amounting to

desertion, may recover the amount of his wages actually earned but is not entitled to wages for the balance of the voyage covered by the Shipping Articles. *Johnson* v. *Blanchard*, 7 Fed. 597; *Brink* v. *Lyons*, 18 Fed. 605; *McKinnon* v. *The Reed*, 39 Fed. 624; *The Buckanan*, 24 F. 2d. 528. See also *The Cripple Creek*, 52 F. Supp. 710.

Appellant makes some contention concerning his alleged "discharge" by the Master. Appelle contends that there is no evidence that the Master did discharge Rogers, and, under the law, the Master could not discharge Rogers without the consent of the American Consul. Judge Yankwitch clearly summarizes the protection given seamen in the matter of discharges in foreign ports in *The Golden Sun,* 30 F. Supp. 354, where he says:

> "The provision calling for the intervention of an American Consul in discharging a seaman in a foreign port, U. S. Rev. Stats, Sec. 4580, 46 U. S. C. A. §682, is very old in our law. The first enactment dates back to the act of February 28, 1851, 2 Stats. 203; See: *Tingle* v. *Tucker,* 1849, Fed. Cas. No. 14,057. It was made more for the benefit of the seamen, than of the owners of a ship. It seeks to protect them against arbitrary discharge or discharge for causes not warranted by the practices under maritime law. Since its enactment, it has been determined definitely that the intervention of the Consul is a condition precedent to a valid discharge. The master who, without seeking such intervention, discharges a seaman, runs the risk of having to prove the justness of the discharge. As said by Attorney-General Caleb Cushing: 'He (the master) had no right to determine of himself the facts on which he assumed to act, nor to consummate the discharge without intervention of the consul.' Discharge of Seamen, 7 Op. Atty. Gen. 1855, p. 349, 350.

> "And see: *Hathaway* v. *Jones*, D. C. Mass. 1863, Fed. Cas. No. 6212; Discharge of Seamen in Foreign Port, 16 Op. Atty. Gen. 1879, page 268; *Nieto* v. *Clark*, 1858, D. C. Mass., Fed. Cas. No. 10,262; *The Annie*, D. C. N. Y., 1904, 133 F. 325; *Mattes* v. *Standard Transportation Co.*, D. C. N. Y. 1921, 274 F. 1019, 1023."

In the present case there is no direct testimony by Rogers that he was discharged by the Master. There is only hearsay testimony to Rogers in which he states that the chief engineer informed him that the Master wished to discharge Rogers and also the testimony of Mr. Reusswig. The entry in the engine log, upon which appellant places reliance, clearly shows that Rogers did not accept the chief engineer's statement that he was discharged. The entry shows (Ex. 1): "Mr. Rogers gone to Consul, ordered off the ship by Captain, his time to terminate this date at midnight."

This entry shows that Rogers did not eccept the alleged discharge and knew where he should go to get relief.

It is clear that Rogers was not discharged and that he did not consider himself discharged.

He was not afraid of the Master. He merely left the ship because of petty differences with the Master and not because of fear or threats from the Master. He is not entitled to a finding that he should have his wages and damages for the indignities and inconveniences he suffered because such were caused solely by his own conduct.

APPELLANT'S PROPOSITION II

Rogers did not claim double wages under R. S. 4529, 46 U. S. C. A. §596, at the time of trial. This is being raised for the first time on this appeal.

This section provides that "Every Master or owner who refuses or neglects to make payment . . . . . without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods."

The words "refuses or neglects to make payment . . . . without sufficient cause" connote conduct which was arbitrary, unreasonable or willful. *Collie* v. *Ferguson*, 281 U. S. 52, 74 L. Ed. 696; *McCrea* v. *U. S.*, 294 U. S. 23, 79 L. Ed. 735.

Rogers is certainly not entitled to double wages for the money earned up through July 11, 1946, because the master could not have paid that money on that day. Rogers was homeward bound as a stowaway on the GENERAL MIX at that time. As soon as the ship touched a continental United States port, those wages were paid to the Shipping Commissioner.

Rogers also apparently claims that he should be paid double wages for those wages unearned by him for the remainder of the voyage after the ship left Shanghai. The cases are uniform that where there is a doubtful legal question of a seaman's right to wages, refusal to pay these wages does not subject the Master or owner to the penalty of double wages. *O'Hara* v. *Luckenbach*

SS Co., 16 F. 2d. 681; *The Silver Shell,* 255 Fed. 340; *The Amazon,* 144 Fed. 153.

Rogers' claim for double wages under R. S. 4529 is without merit.

APPELLEE'S PROPOSITION I

Where the trial judge saw the witnesses, heard their testimony, and had an opportunity of passing upon their credibility and accuracy, his findings of fact and conclusions of law should not be disturbed.

This is a familiar proposition of law which requires little citation and is peculiarly applicable to this appeal. While an admiralty appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest. *The Catalina,* 95 F. 2d. 283; *Puratich* v. *United States,* 126 F. 2d. 914; *Portland Tug & Barge Co.* v. *Upper Columbia River Towing Co.*, 153 F. 2d. 237.

When questions of fact are dependent upon conflicting evidence, the decision of the trial judge who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, should not be reversed. Here the trial court saw and heard all the witnesses. There was no testimony by deposition. He resolved the conflicting testimony and decided that Rogers did not flee "because he feared the Master. Their differences reached no higher level than a school-yard quarrel." In view of the conflicting testimony and with the weight of the evidence being in favor of the appellee,

the trial court should be sustained.

See also *United States* v. *Wilhite,* (CCA 9, 1947) 163 F. 2d. 825.

CONCLUSION

Appellee respectfully urges that the judgment and decree of the District Court be affirmed. The evidence is ample and satisfactory that the appellant left the ship in Shanghai because of petty differences with the master. He was not in fear of the master. His disregard of the lawful authority of the American Consul and of the laws regarding stowaways disqualify him from any sympathetic treatment by a court of law. The trial court was right. It should be affirmed.

Respectfully submitted,

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